Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

LARRY HAILEY,
Petitioner,

v.

NORM HAND and
YAMHILL COUNTY,
Respondents.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the balancing test under Pickering v. Board of Education, 391 U.S. 563 (1968) apply to First Amendment claims of an Operations Captain in a Sheriff's office terminated because the Captain campaigned for the Sheriff's opponent in a non-partisan election to public office.

2. May an elected Sheriff require "political loyalty" of a Yamhill County employee under the Elrod-Branti exception to the First Amendment when the Sheriff is not a "hiring authority" for the County, when the Sheriff does not have authority to terminate County employees, when the County has adopted policies guaranteeing it's employees freedom from retaliation for political activity on non-work time and when the County has policies and practices giving it's employees a property interest in their positions.

LISTING OF PARTIES

The caption of the case contains the parties to the proceeding in the court whose judgment is sought to be reviewed.

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IN THE SUPREME COURT OF THE UNITED STATES

LARRY HAILEY, *Petitioner*

v.

NORM HAND and YAMHILL COUNTY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Larry Hailey respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a) is unreported. By order entered March 20, 2000, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc (App., *infra*, 8a). The opinion of the district court (App., *infra*, 10a) is

unreported.

JURISDICTION

On January 7, 2000, the United States Court of Appeals for the Ninth Circuit entered its memorandum opinion in this case. On March 9, 2000, the United States Court of Appeals for the Ninth Circuit entered its order denying Larry Hailey's petition for rehearing and suggestion for rehearing en banc. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Facts

Yamhill County hired Larry Hailey as a Deputy Sheriff in 1993. He served a period of probation and became a permanent County employee. He subsequently went through a competitive process and was selected for promotion to Lieutenant in 1994. In 1995, his position was reclassified to Operations Captain.

In 1996, Norm Hand ran for election to the office of Yamhill County Sheriff. In Oregon, election to the Sheriff's Office is non-partisan. Mr. Hand's opponent in the campaign was, Paul May, a Support Services Captain employed in the Yamhill County Sheriff's Office.

During the campaign Mr. Hand approached Mr. Hailey seeking his support in the election. Mr. Hand told Mr. Hailey he had heard that Mr. May had attempted to get Mr. Hailey fired but that then Sheriff Lee Vasquez wouldn't let Mr. May get rid of Hailey. Mr. Hailey spoke directly to Mr. May, personally investigated Mr. Hand's statements and concluded that what Mr. Hand had reported to him was not accurate.

Subsequently, Mr. Hailey publicly campaigned for Mr. May in opposition to Mr. Hand. Mr. Hailey wrote letters to the editor, posted lawn signs and went door to door speaking to citizens on behalf of Mr. May's candidacy.

The election was conducted in November, 1996. Norm Hand prevailed in the election and took office in January, 1997. On February 20, 1997, then Sheriff Hand asked to meet with Captains Hailey and May. Sheriff Hand advised Captains Hailey and May that he intended to reorganize the office, eliminating their positions, and that they would be terminated effective March 31, 1997. Moments after the meeting with Mr. May and Mr. Hailey, Mr. Hand met alone with Mr. May and informed him that he was filing an election law complaint against Mr. May.

Mr. Hailey retained an attorney who wrote to the Board of County Commissioners seeking an investigation of Mr. Hand's proposal to terminate him. Mr. Hand initially took the position he wanted Mr. Hailey and Mr. May out of the Sheriff's organization completely. However, two Yamhill County Commissioners declined to approve Hand's proposed action unless Hand offered Mr. Hailey and Mr. May meaningful positions within the Sheriff's organization. Mr. Hand responded, initially, by offering both Mr. Hailey and Mr. May clerical positions as computer technicians. When Mr. Hailey and Mr. May rejected the clerical work, Mr Hand offered them employment as corrections officers.

Although Mr. Hailey and Mr. May were dissatisfied with the offer, they accepted the positions,

reserving their rights to contest the legality of their terminations.

On March 31, 1997, Mr. Hailey and Mr. May were terminated from their employment. On April 1, 1997, Yamhill County hired both individuals to work as corrections officers. Mr. Hand's recommended offer of employment was approved by the Yamhill County Board of Commissioners.

In Yamhill County, employees working in the Sheriff's Office are County employees hired by the Board of County Commissioners. Yamhill County has adopted an ordinance giving all County employees a right to a hearing before, and a final decision from, the County Commissioners concerning any proposal to discipline or discharge the employee. Yamhill County Counsel has advised employees working in the Sheriff's Office that they could not be terminated for running for election to the Sheriff's Office because the County has policies precluding employees from being terminated without just cause. The County has a practice extending over a period of twenty years of requiring just cause to terminate an employee. Yamhill County has adopted a policy statement permitting employees to engage in political activity on non-work time to the maximum extent permissible under the law without fear of reprisal. Historically, employees in the Sheriff's Office have campaigned for election as Sheriff against each other. There is no evidence in the record that any of these policies have caused difficulty for, or disruption to, the operation of the Sheriff's Office.

Proceeding Below

Mr. Hailey filed a complaint in the U.S. District Court alleging that he was terminated from his position as Operations Captain because he campaigned for the Sheriff's opponent in a public election. Mr. Hailey alleged that Sheriff Hand and Yamhill County breached an employment contract with plaintiff by terminating him from his position as Operations Captain without just cause. He also alleged that he maintained a property interest in his employment as Operations Captain which could only be terminated for cause arising by virtue of verbal promises, County policies, and County practices[1]. Mr. Hailey claimed that his termination deprived him of the benefit of his property interest without due process of law. Petitioner's complaint was filed against Norm Hand, Sheriff of Yamhill County and Yamhill County. The jurisdiction of the District Court was invoked under 28 USC §1343 and 28 USC §1331. Jurisdiction of the state contract claim was invoked under 28 USC §1367.

Defendants filed for summary judgment on the grounds that 1). Assuming Petitioner was terminated because he campaigned for the Sheriff's opponent, his position as an Operations Captain was a "policymaking" position under this court's decision in Elrod v Burns, 427 U.S. 347 (1976) and Branti v Finkel, 445 U.S. 507 (1980); 2). Under Elrod-Branti, Petitioner's termination was permissible under the First

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[1]Mr. Hailey amended his complaint adding an age discrimination claim. The district court granted summary judgment against the claim. Petitioner did not appeal the dismissal of the age discrimination claim.

Amendment; and, 3). Petitioner's evidence was insufficient to show the existence of a contract, a statute, a County regulation or policy which created a property interest in his employment and which could only be terminated for cause.

On the First Amendment claim, Petitioner argued that the balancing test set forth in Pickering v. Board of Education, 391 US 563 (1968) applied to Petitioner's speech in an election campaign and respondents failed to produce any evidence of any governmental interest which outweighs Petitioner's interest in commenting on matters of public concern.

On the Fourteenth Amendment claim Petitioner pointed to verbal promises, County policies and admissions from County managers to establish his employment could only be terminated for just cause.

The district court granted Sheriff Hand and Yamhill County's Motion for Summary Judgment on the First Amendment claim, holding: 1). Generally, a public employee's claim for violation of the First Amendment is analyzed under Pickering v Board of Education, 391 U.S. 563 (1968), however "policymaker" employees are excluded from First Amendment protection under this Court's decisions in Elrod v Burns, 427 U.S. 347 (1976) and Branti v Finkel, 445 US 507 (1980); 2). Under the Ninth Circuit's decision in Fazio v City and County of San Francisco, 125 F.2d 1328 (9th Cir 1997), the court conducts a functional analysis of the duties of the position, considering whether the position includes vague or broad responsibilities, relative pay, technical competence, power to control others, authority to

speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders to decide if the position is a policymaking position; and, 3). Applying the Fazio factors to Petitioner's duties, Petitioner was a policymaker who could be terminated for his political opposition to Mr. Hand in the election, as a matter of law.

The district court also granted Sheriff Hand and Yamhill County's Motion against the Due Process and breach of contract claims holding that: 1) Mr. Hailey's evidence was insufficient to show the existence of a contract of employment, a statute, or a County regulation or policy which granted plaintiff a property interest in his Operations Captain position which could only be terminated for cause.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. In a memorandum decision by Circuit Judges Goodwin, B. Fletcher and Tashima, the Ninth Circuit Court of Appeals concluded although the Elrod-Branti cases concerned employees terminated for partisan political affiliation, the Ninth Circuit's decision in Fazio v City and County of San Francisco, 125 F.2d 1328 (9th Cir 1997) extended the Elrod-Branti exception to "political loyalty" cases, e.g., where an employee runs for election against his supervisor. The Ninth Circuit Court of Appeals concluded that the Fazio decision required dismissal of Mr. Hailey's First Amendment claim.

On the breach of contract and Due Process claims, the Ninth Circuit declined to determine whether the district court erred in deciding Petitioner's

breach of contract and Due Process claims. The Ninth Circuit concluded that even if Mr. Hailey were an employee who could only be fired for "just cause", the determination that Mr. Hailey could be terminated under the First Amendment as a "policymaker" effectively resolved his breach of contract and Due Process claims.

Larry Hailey filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on March 9, 2000.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented in this Case Are Important

This case concerns a 4 year public employee with a claimed property interest in his position who was informed that County policy prohibited terminations because of an employee's political activity; and, who was terminated because he campaigned for the Sheriff's opponent in a non-partisan election to public office.

This case raises two significant questions under First Amendment law: 1) Whether this court's partisan political affiliation decisions, Branti v Finkel, 445 U.S. 507 (1980) and Elrod v Burns, 427 US 347 (1976), extend to what the circuit courts have referred to as "political loyalty" cases, i.e., public employees terminated for speech in opposition to the successful candidate in a non-partisan election; and, 2). If Elrod-Branti applies to such claims, whether evidence that the elected official has neither hiring nor firing

authority; evidence that the hiring authority (in this case the County) has adopted policies and practices giving employees property interests in their positions; evidence that the hiring authority has adopted policies guaranteeing County employees freedom from retaliation for supporting candidates in elections; evidence that these same County policies have been in effect for over twenty years without any difficulty for, or disruption of, the Sheriff's Office; and, evidence that the employee in question, Mr. Hailey, filled a County position, not a position of the Sheriff, creates an issue of fact as to whether a political affiliation requirement is a reasonable one for the position in question.

At present, the circuits' courts are divided as to whether the Elrod-Branti exception applies to claims such as Petitioner's; and over how to apply Elrod-Branti. National uniformity is necessary because of the vital importance of free, democratic and informed electoral processes. This case involves fundamental questions of who may participate in elections free from retaliation at work.

II. The Question of Whether the Pickering Balancing Analysis or the Elrod-Branti Exception Applies to Claims of Public Employees Terminated for Speech in Election Campaigns Has Split the Circuit Courts.

The First Amendment issues that Larry Hailey has raised in this Petition are issues that have divided the Courts of Appeals. The issues raised in this Petition have resulted in conflicting opinions between the circuits and conflicting opinions from panels within the same circuits. In Jones v Dodson, 727 F.2d 1329, 1335

(4th Cir 1984), an "interim" Sheriff and a dispatcher claimed they were fired for political affiliations and expressive conduct. The Fourth Circuit Court of Appeals concluded that the Elrod-Branti exception was limited to discharges "solely for patronage reasons." If a discharge was motivated by overt speech in a political campaign, the court found, then the Pickering balancing analysis applied, not the Elrod-Branti policymaker exception[2]. Similarly, in McBee v Jim Hogg County, Tex., 703 F.2d 834, *vacated and remand'd*, 730 F.2d 1009 (5th Cir 1984), the Fifth Circuit Court of Appeals found that the Pickering balancing analysis applied to the claims of three Sheriff's Deputies fired for campaigning for the Sheriff's opponent. The Fifth Circuit rejected a panel decision that Elrod-Branti extended to employment decisions based upon "support of and loyalty to a particular candidate as distinguished from a political party." McBee, *supra*, 703 F.2d at 838, n. 1.

In addition to the Fourth Circuit's decision in Joyner v Lancaster, 815 F.2d 20 (4th Cir 1987), the Third, Seventh, Tenth and Eleventh Circuit Courts of

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[2]Three years after Dodson, the Fourth Circuit applied Pickering balancing to the claim of a Captain terminated by the Sheriff for political activity. Joyner v Lancaster, 815 F.2d 20, 23 (4th Cir 1987). Thirteen years later, the Fourth Circuit, *en banc*, applied Elrod-Branti to claims of Deputy Sheriffs alleging they were fired for supporting the Sheriff's election opponent. Five judges endorsed the court's opinion and five judges dissented. Jenkins v Medford, 119 F.3d 1156, 1164 (4th Cir 1997).

Appeals have applied the Elrod-Branti analysis to claims of Sheriff's Office employees alleging they were terminated for speech involved in elections, although the results of the cases have been plainly inconsistent. *See*, Burns v County of Cambria, 971 F.2d 1015, 1023 (3rd Cir 1992); Upton v Thompson, 930 F.2d 1209, 1282, *reh'g denied*, 938 F.2d 84 (7th Cir 1991); Dickeson v Quarberg, 844 F.2d 1435, 1442 (10th Cir 1988); Terry v Cook, 866 F.2d 373 (11th Cir 1989).

The opinions within the Ninth Circuit on the applicability of Elrod-Branti to "political loyalty" claims are also seriously divided. In Thomas v Carpenter, 881 F.2d 828, 831 (9th Cir 1989), the Ninth Circuit applied Pickering balancing to the First Amendment claims of a Sheriff's Lieutenant who alleged he was retaliated against for challenging the Sheriff in a non-partisan election. Similarly, in Finkelstein v Bergna, 924 F.2d 1449, 1453 (9th Cir 1991), in a case where a prosecutor claimed he was suspended for statements made in an election campaign, the Ninth Circuit stated that the prosecutor's position was unimportant to the straightforward application of the general rule prohibiting discharge of public employees for protected speech. At least one district court within the Ninth Circuit has concluded that the Thomas and Finkelstein decisions require application of Pickering balancing to claims of public employees terminated for speech in election campaigns. Meek v County of Riverside, 982 F. Supp. 1410 (C.D. Cal. 1997).

III. The Ninth Circuit's Decision in this Case Was Erroneous.

Finally, and most significantly, the decision of

the United States Court of Appeals for the Ninth Circuit in this case is erroneous. This Court's recent decision in O'Hare Truck Service v Northlake, 518 U.S. 712, 135 LEd2d 874 (1996) strongly suggests that the Ninth Circuit erred when it failed to apply Pickering balancing to Petitioner's claims. In O'Hare, this Court discussed Elrod-Branti as cases limited to claims based solely upon political affiliation:

> "Elrod-Branti involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of any inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not to be subject to probing or testing by government."

O'Hare, *supra*, 135 LEd2d at 882. Emphasis Added.

"[A] different, though related inquiry ..." is called for when "a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from Pickering." O'Hare, *supra*, 135 LEd2d at 882.

When political affiliation and free speech issues are intermixed in a case, the Court made clear that Pickering balancing must be conducted.

> "A reasonableness analysis will also accommodate those many cases...where specific instances of the employee's speech or expression, which require balancing in the Pickering context are intermixed with a political affiliation requirement. In those cases, the balancing Pickering mandates will be inevitable."

O'Hare, *supra*, 135 LEd2d at 882.

In this case, on the summary judgment motion, Sheriff Hand and Yamhill County presented no evidence that Mr. Hailey's protected speech impaired discipline or harmony among co-workers, had a detrimental impact on close working relationships, impeded the performance of Mr. Hailey's duties or interfered with the regular operation of the Sheriff's Office. Both the district court and the Ninth Circuit Court of Appeals erred in failing to apply Pickering balancing to Petitioner's claims; and, both courts should have denied the motions because Respondents failed to make any showing of entitlement to summary judgment under Pickering.

If the Elrod-Branti analysis applies to claims such as Petitioner's, the second question presented in this case is equally important and the Ninth Circuit's decision equally erroneous. Petitioner presented evidence that Sheriff Hand was not a hiring authority, that Petitioner was not an "at will" employee, and that Petitioner's employer, Yamhill County, had policies and procedures which guaranteed employees the right to engage in political activity in non-work hours free

from reprisal.

The district court and the Ninth Circuit declined to consider Petitioner's evidence in deciding whether political affiliation was an appropriate requirement for Petitioner's position. Instead, both courts limited their consideration to evidence of the duties of the position.

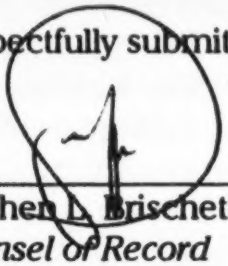
It makes little sense to say that a County employee employed by the Board of County Commissioners in a County that disclaims any interest in employees political activity outside of work hours and that assures County employees due process protections against discharge owes a duty of political loyalty to an elected official who is not the employee's hiring authority. The very protections the County has created and the fact that the County has assumed itself hiring authority necessarily shows that Petitioner is not a "policymaker" for the **Sheriff**. If the Elrod-Branti analysis applies, this Court should conclude that plaintiff's evidence is sufficient to create an issue of fact as to whether a political affiliation requirement is an appropriate one for the position in question.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for certiorari, reverse the order granting summary judgment on the First Amendment claim and remand for trial of the claim, and reverse the order granting summary judgment on

the breach of contract and Due Process claims[3] and remand to the Ninth Circuit for consideration of Petitioner's appellate issues raised on those claims.

Respectfully submitted,



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[3]Remand of the breach of contract and Due Process claims is appropriate because the Ninth Circuit, based on it's disposition of the First Amendment claim, declined to decide the issues Mr. Hailey raised on appeal.

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY HAILEY,	No. 98-35579
Plaintiff-Appellant,	D.C. No. CV-97-01712-OMP
v.	MEMORANDUM[1]
NORM HAND, Sheriff of Yamhill County; YAMHILL COUNTY, an Oregon municipal entity,	Filed January 7, 2000
Defendants-Appellees.	

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Senior District Judge, Presiding

Argued and Submitted July 16, 1999
Portland, Oregon

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. R. 36-3.

Before: GOODWIN, B. FLETCHER and TASHIMA, Circuit Judges

In a contested election for sheriff, Larry Hailey supported the losing candidate. The new sheriff terminated him from his position as a captain with the Yamhill County Sheriff's Office ("YCSO"). On February 20, 1997, Norm Hand, the new sheriff, informed Hailey that he was reorganizing the YCSO, and that his position was being eliminated effective March 31. After some negotiation, Hailey agreed to accept a position as a corrections officer with the County, while expressly reserving his rights to challenge his termination. Hailey filed suit, alleging that the termination violated rights guaranteed to him by the First Amendment and Due Process Clause, was a breach of contract, and discriminated against him on account of age. The district court granted summary judgment in favor of Defendants. On appeal, Hailey claims that his termination violated the First Amendment and the Due Process Clause.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291 and review de novo the district court's grant of summary judgment. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998).

As a matter of law, the district court did not err in holding that the undisputed duties exercised by Hailey made him a policymaker. The Supreme Court

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[2]Hailey does not appeal from the grant of summary judgment with respect to his age discrimination claims. Hailey's breach of contract claim turns on the same analysis of "just cause" protections as his due process claim.

protect all public employees in all situations from the whims of political patronage. In two cases, *Elrod v. Burns*, 427 U.S. 347, 366-7 (1976), and *Branti v. Finkel*, 445 U.S. 507, 517 (1980), the Court made it clear that public employees who are "policymakers" may be terminated for political reasons without violating the First Amendment.[3] The essential inquiry is "not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

The Ninth Circuit has elaborated on the Supreme court's standard and held that "some factors

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[3]Although the discharged employees in both *Elrod* and *Branti* were fired because of their political affiliations, this court has extended the *Elrod-Branti* exception to "political loyalty" cases where, for example, an employee runs against his supervisor. *See Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1332 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998); *Finkelstein v. Bergna*, 924 F.2d 1449, 1451 (9th Cir. 1991) (terminated deputy district attorney ran against his supervisor's chosen successor); *Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989) (applying *Elrod-Branti* analysis where a sheriff retaliated against his lieutenant for running against him); *accord Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997) (en banc) (applying *Elrod-Branti* analysis where sheriff's deputies dismissed after supporting sheriff's opponent), *cert. denied*, 118 S. Ct. 881 (1998).

to be considered when determining whether a job is a policymaking position are: vague and broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of the policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders." *Fazio v city and County of San Francisco*, 125 F.3d 1328, 1334 (9th Cir. 1997). The Ninth Circuit has held that even a private attorney who participated in strategy sessions, held privileged personnel meetings and represented a municipality in public settings was a policymaker. *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 997 (9th Cir. 1999).[4]

As a Field Operations Captain, Hailey was in charge of the main operations division of the sheriff's office, a position only one step removed from the sheriff. He was responsible for the administration of the operations division of the YCSO, with duties

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[4]A number of other circuits have found that deputy sheriffs had sufficient autonomy and proximity to the sheriff's role to be policymakers. *Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997) (sheriff may dismiss deputies either because of party affiliation or campaign activity because either "serves as a proxy for loyalty to the sheriff"); *Upton v. Thompson*, 930 F.2d 1209, 1215-17 (7th Cir. 1991) (discussing cases treating loyalty as a crucial qualification for sheriff's deputies); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) (holding that the "loyalty to the individual sheriff and the goals and policies he seeks to implement" is an appropriate requirement for deputies).

including the training and supervising of 45 YCSO employees, contributing to discussions regarding management and policy, and representing the Sheriff before the Board of Commissioners and in the community. Hailey attended regular executive meetings with the sheriff and key personnel, actively participated in the budget process and had full authority to make work assignments for and to discipline the officers he supervised. On the basis of these undisputed facts regarding Hailey's duties, the district court did not err in holding that Hailey was a "policymaker" within the meaning of the *Elrod-Branti* exception. Therefore, Hailey could be dismissed by Sheriff Hand without running afoul of the First Amendment.

Hailey also appeals the district court's summary judgment denial of his due process claim. Hailey claims that his termin-ation deprived him of a property interest without adequate procedural due process.[5]

In the employment context, as a general matter, a property interest protected by the Due Process Clause will be found where an employee cannot be

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[5]In his complaint, Hailey alleged that the termination violated both his substantive and procedural due process rights. The district court ruled that Hailey's substantive due process claim was grounded in First Amendment principles, and thus declined to analyze separately the substantive due process claim. Hailey does not challenge this ruling on appeal, and thus we limit our discussion to his procedural due process claim.

Clause will be found where an employee cannot be terminated except for "just cause." *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Employees who enjoy "just cause" protections are entitled to pretermination notice and hearing. *See id.* at 542. Under Oregon law, absent a statute, rule, regulation, or contractual term to the contrary, sheriff's deputies are "at will" employees. *See* O.R.S. § 204.601(2); O.R.S. § 204.635(1); *Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998). The Oregon Supreme court, however, has recognized that this "at will" status can be modified by counties by the adoption of personnel rules creating due process or "just cause" requirements. *See Graves v. Arnado*, 768 P.2d 910, 912 (Or. 1989).

Hailey argues that he enjoyed "just cause" protections as a YCSO captain, pointing to a Yamhill county policy known as Board Order 88-96, which provides for notification of charges in writing and the opportunity to respond to charges. The policy on its face is replete with procedural protections, although it does not specifically include "just cause" language. Hailey introduced testimony from the County Personnel Officers suggesting that the County viewed Board Order 88-96 as continuing the prior County policy, which expressly extended "just cause" protections to employees like Hailey. Be that as it may, even if Hailey were a "just cause" employee for some purposes, the most that he would be entitled to under the circumstances of his termination was to show that he was not a "policymaker". Since we find, as a matter of law, that Hailey was a "policymaker" this question has been heard and resolved. Therefore,

for the reasons discussed above, the district court's grant of summary judgment is AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 98-35579
LARRY HAILEY,	)
	) D.C. No. CV-97-01712-OMP
Plaintiff-Appellant,	)
	)
v.	) ORDER
	) Filed March 9, 2000
NORM HAND, Sheriff of	)
Yamhill County; YAMHILL	)
COUNTY, an Oregon	)
municipal entity,	)
	)
Defendants-Appellees.	)
	)

Before: GOODWIN, B. FLETCHER AND TASHIMA, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Tashima voted to deny the petition for rehearing and Judges Goodwin and B. Fletcher so recommended.

The full court has been advised of the petition for rehearing en banc an no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LARRY HAILEY,	)	
	)	
Plaintiff,	)	CV 97-1712-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL	)	
COUNTY, an Oregon	)	OPINION
Municipal entity,	)	
	)	Filed May 12, 1998
Defendants.	)	

Plaintiffs Paul May and Larry Hailey bring these actions against defendants Yamhill County and Yamhill County Sheriff Norm Hand. Plaintiffs, former captains in the Yamhill County Sheriff's Office (YCSO), contend that defendants violated their constitution rights by eliminating their positions because of their political opposition to Hand. Defendants move for summary judgment in each case. I grant the motion in its entirety in the Hailey case. The motion in the May case is granted in part and denied in part.

BACKGROUND

In the fall of 1996, May and Hailey held two of three captain positions in the YCSO. May ran for Sheriff against defendant Norm Hand in a November 1996 election. Hailey support May. Hand won and assumed office in January 1997.

Hand restructured YCSO. He eliminated May's and Hailey's captain positions and created the new position of undersheriff. Immediately thereafter, both plaintiffs began working as corrections deputies where they remain employed.

STANDARDS

The court should grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of Am. v. Phelps Dodge Corp., 856 F.2d 1539, 1542 (9th Cir.), cert denied, 493 U.S. 809 (1989).

The substantive law governing a claim determines whether a fact is material. T. W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The court should resolve reasonable doubts about the existence of a material factual issue against the moving party. Id. at 631. The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. Id. at 630-31.

DISCUSSION

I. First Amendment Claims - Elimination of Captain Positions

Plaintiffs contend that Hand eliminated their captain positions because of their political opposition to Hand in the sheriff's election. Defendants argue that plaintiffs occupied policymaking positions, termination of which may be politically motivated.

Generally, a public employee's claim for violation of his or her First Amendment rights is analyzed under Pickering v. Board of Educ., 391 U.S. 563 (1968). However, a different analysis applies for "policymaking" employees. Branti v. Finkel, 445 U.S. 507, 517 (1980); Elrod v. Burns, 427 U.S. 347, 372 (1976). Under Elrod-Branti, elected administrators have discretion to consider political affiliation in filling high-level confidential policymaking positions. Id.; Lumpkin v. Brown, 109 F.3d 1498, 1501 (9th Cir. 1997).

A number of courts, including Magistrate Judge Jelderks for this court, have concluded that Elrod-Branti applies to relationships between sheriffs and their deputies. See, e.g., Jenkins v. Medford, 119 F.3d 1156, 1164 (4th Cir. 1997) (en bank) (office of deputy sheriff was that of a policymaker and was the alter ego of the sheriff; Elrod-Branti applied), cert. denied, 118 S. Ct. 881 (1998); Slyter v. Noelle, No. CV-96-783-JE, Opinion at 11-13 (D. Or. June 27, 1997) (new Multnomah County Sheriff's elimination of chief deputy sheriff's position did not violate First Amendment under Elrod-Branti).

Plaintiffs argue that Elrod-Branti applies only to at-will employees which, according to plaintiffs, they were not. I do not reach this argument because, as discussed below in connection with the procedural due process claims, I conclude that plaintiffs are at-will

employees. Plaintiffs also argue that Hand is not entitled to summary judgment because Elrod-Branti applies only to the "hiring authority" which, they maintain, Hand was not because all hiring decisions in Yamhill County are made by the Board of County Commissioners.

As support for this argument, plaintiff rely on a single passage from Branti in which the court was discussing the nature of a "policymaker." Branti, 445 U.S. at 518. Plaintiffs cite no cases, and I have found none, holding that Elrod-Branti applies only to the person or public body actually executing the personnel decision as opposed to the person or public body making the authority, I reject plaintiffs' argument.

Assuming *arguendo* that Hand's elimination of the captain positions was politically motivated, defendants argue that plaintiffs occupied policymaking positions which could be eliminated for political reasons without violating the First Amendment. In his position as Support Services Captain, May was responsible for a broad range of activities within the YCSO. He appeared before the Board of County Commissioners on a variety of matters. He was ultimately responsible for the development and implementation of a policy manual. He supervised approximately twenty-four regular employees and volunteers, including sergeants. He had authority to discipline anyone in his division. He represented the YCSO in all labor grievance matters. The only higher ranking person in the YCSO was the Sheriff himself.

In his position as Field Operations Captain, Hailey had a variety of high level functions within the

department. He was responsible for the administration and supervision of all functions within the operations division. He regularly met with the Sheriff and the other two captains to discuss management and policy issues. He supervised approximately forty-five people and had full authority to discipline members, including sergeants. He frequently represented the sheriff before county commissioners and in the community. The only higher ranking person in the YCSO was the Sheriff himself.

As the Ninth Circuit recently noted, the term "policymaker" "does not mean 'one who makes policy[]' . . . but refers to a position in which political considerations are 'appropriate requirement[s] for the effective performance of the public office involved.'" Fazio v. City and County of San Francisco, 125 F.3d 1328, 1333 (9th Cir. 1997) (quoting Branti, 445 U.S. at 519), cert. denied, 1998 WL 73024 (U.S. Apr. 20, 1998). Factors to consider when determining whether a position is a "policymaking" one include "'vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.'" Id. (quoting Hall v. Ford, 856 F.2d 255, 262 (D.C. cir. 1988)).

Plaintiffs do not challenge defendants' factual assertions about the positions' duties and I reject plaintiffs' argument that Yamhill County cannot have any policymaking positions because it prohibits employees from engaging in political activity on the

job. The cases make clear that determination of a "policymaker" is a functional analysis examining the duties of the position; engagement in political activity is not dispositive.

Under the undisputed facts, plaintiffs" captain positions were "policymaking" positions as that term is defined in Fazio. I grant defendants' motions on these First Amendment claims.

II. Due Process Claims

Although plaintiffs raise both substantive and procedural due process claims, the substantive due process claims are equivalent to the First Amendment claims discussed above and need no separate analysis. See, Armendariz v. Penman, 75 F.3d 1311, 1325 (9th Cir. 1996) (en banc) (scope of substantive due process does not extend to circumstances already addressed by other constitutional provisions).

"A government employee is not entitled to due process based on deprivation of property, when removed for a position, unless the employee has a 'legitimate claims of entitlement' to the position." Weisbuch v. County of Los Angeles, 119 F.3d 778, 780 (9th Cir. 1997) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). "To determine whether an entitlement exists, a court looks to 'existing rules and understandings that stem form an outside source such as state law." Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 475 (9th Cir 1991) (quoting Roth, 408 U.S. at 577.

Oregon statutes create at-will employment

relationships for county sheriff's deputies. See, Or. Rev. Stat. (ORS) 204.601(2) (county deputies and employees paid from county funds hold office during the pleasure of the appointing officer); ORS 204.635(1) ("sheriff's deputies shall be appointed by the sheriff in writing and continue during the pleasure of the sheriff."). However, county personnel policies may, consistent with ORS 204.601 and ORS 204.635, impose conditions of "just cause" on a sheriff's authority to terminate the employment of deputy sheriffs. Graves v. Amado, 307 Or. 358, 360, 768 P.2d 910, 911 (1989). The parties dispute whether Yamhill county's personnel policies create a just cause dismissal standard.

The county's 1988 personnel policies, the operative policies in this case, contain no "just cause" language. Those policies state that "[e]mployees outside the county's bargaining units may be disciplined or discharged for failure to fulfill their responsibilities as employees. . . . ." Defts' Exh. A to Mikami Affid.

Defendants argue that the 1988 personnel policies contain no "cause" type language required to create a protected property interest. I agree. A "failure to fulfill his or her duties" discipline or termination standard is too broad and amorphous to be considered "just cause."

In addition, even if the 1988 personnel policies contained the express "just cause" words, a recent Ninth Circuit case indicates that there is no protected property right because of a disclaimer in the 1989 employee handbook. In Lawson v. Umatilla County,

Nos. 96-36060, 97-356634, 1998 WL 117866 (9th Cir. Mar. 18, 1998), the court held that because the defendant's personnel policies contained a disclaimer stating that the policies did not create a contract, the plaintiff did not, under Oregon law, possess a property interest in continued employment, despite the fact that the personnel policies also limited the grounds for discipline or discharge to "cause." Id. at *3. The employee handbook in this contains a similar disclaimer. Defts' Exh. B to Mikami Affid.

Here, evidence supports construing the employee handbook as a supplement to the 1988 personnel policies. See Defts" Exh. 4 (Mikami Affid.) at 2 (stating that the employee handbook "supplements the [County's] Policy and Procedure Manual"); Defts" Exh. C to Mikami Affid. (handbook itself states that it is intended to serve as "guidelines regarding county policy, procedure, ..."). So construed, Lawson holds that the disclaimer negates any "cause" language contained in the 1988 personnel policies.

Plaintiffs argue that a just cause standard exists because (1) there is a history of a just cause standard in Yamhill County; (2) promises of a just cause standard were made to May; and (3) Oregon Revised Statutes create a just cause standard for police officers. I reject these arguments for the following reasons.

As to promises made to May, evidence suggests that any such promises were made only in regard to retirement benefits in the wake of Ballot measure 8 prohibiting public employers from continuing to make the employee "pick-up" contribution to the public

employee retirement system. See, e.g., Pltfs' Exh. N (Lopuszynski Depo.) at 5 (benefits only example of effort to treat non-bargaining unit and bargaining unit staff alike); Pltfs' Exh. 4 to Hailey Affid. (document indicating that Yamhill county to treat bargaining unit and nonbargaining unit staff alike expressly states that it relates solely to the retirement system contribution as a result of Ballot Measure 8).

Additionally, even if such a promise were made to May, and somehow this carried over to Hailey as well, it would have been made without authority and cannot bind Yamhill County. See, e.g., Butler v. Portland Gen. Elec. Co., 748 F. Supp. 783, 792-93 (D. Or. 1990) (Judge Frye noting that an implied contract containing a just cause standard cannot be created by mere casual or unauthorized comments), aff'd, 958 F.2d 377 (9th Cir. 1992); Holdner v. Columbia County, 123 Or. App. 48, 51-52, 858 P.2d 901, 902 (1993) (rejecting plaintiff's argument that county commissioner had apparent authority to bind county to promise made to plaintiff by county commissioner.)

Finally, the statute creating a just cause standard for police officers is irrelevant in this case because it does not apply to supervisory employees like plaintiffs and does not apply when a county has adopted its own personnel policies. ORS 236.370(3) and (6).

I grant defendants' motions on the due process claims.

III. Breach of Contract Claims

Plaintiffs allege that defendants breached their employment contracts by terminating them without just cause. For the reasons stated in the previous section, I grant summary judgment to defendants on these claims because there was no just cause provision in the applicable employment policies.

IV. Age Discrimination - Elimination of Captain Positions

Plaintiffs contend that their captain positions were eliminated because of their age. To establish the requisite inference of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S. C. §§ 621-634, plaintiffs must show that: (1) they were members of the protected class; (2) they were performing their jobs in a satisfactory manner; (3) they were terminated; and (4) they were replaced by a substantially younger employee with equal or inferior qualifications. Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994).

At the time the captain positions were eliminated, May was forty years old and Hailey was forty-eight. I assume for the purposes of this motion that they were satisfactorily performing their jobs and that they were terminated. May's duties were assumed by Sheriff Hand and Sergeant Kowalik, both of whom are older than May. Hailey's duties were assumed by Sheriff Hand, who is older than Hailey, and to some extent by Curt Gilbert, who is forty-four years old. Although Gilbert is younger than Hailey, he is not substantially younger. Thus, plaintiffs fail to

establish prima facie cases.

Even if plaintiffs could establish prima facie cases, I would still grant summary judgment to defendants on the ADEA claims because plaintiffs fail to create a genuine issue of material fact regarding pretext. Defendants argue that the captain positions were eliminated because of Hand's departmental reorganization. To survive summary judgment, plaintiff must provide enough evidence so that a reasonable factfinder could conclude that this asserted justification is pretextual. See, e.g., Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918 (9th Cir. 1996) (to survive summary judgment, plaintiff must produce enough evidence to allow a reasonable factfinder to conclude that the alleged reason for the plaintiff's discharge is false or that the true reason was a discriminatory one), cert. denied, 118 S. Ct. 369 (1997). Plaintiffs fail to do so.

The evidence shows that in January and February 1997, Hand conducted a "perception audit" of the sheriff's department to assess the feelings of employees. Detective Larry Pedersbeck made a written statement indicating dissatisfaction by "front line supervisors" regarding older employees being promoted over them. Pltfs' Memo. at 26. Plaintiffs also rely on testimony from Krawczyk that Hand was critical of Hailey's "authoritarian style of management" as causing "erosion of morale." Pltfs' Exh. F at 9.

A reasonable factfinder could not find the requisite pretext from this evidence. The statements are about only Hailey, not May. The statement made by Hand to Krawczyk about Hailey mentions nothing

about age and does not establish that Hand relied upon any information from his front line supervisors. At best, it shows that Hand had a belief about Hailey's management style which could have been formed from Hand's own observations of Hailey or from any number of other ways. Finally, even if front line supervisors passed information to Hand, there is no evidence any of them communicated any feelings about age or older workers to Hand. Thus, plaintiffs fail to create a genuine issue of material fact regarding age being a factor in Hand's decision to eliminate the captain positions. I grant summary judgment to defendants on these age discrimination claims.

V. May's Promotional Opportunities

May contends that defendants denied him several promotional opportunities because of his age and in retaliation for his political opposition to Hand. As to the First Amendment retaliation claim, defendants argue Elrod-Branti allows them to consider May's political opposition to Hand in filling job vacancies. Although Elrod-Branti applies to decisions concerning promotions, as to lower-level public employment positions, "promotions [or lack thereof] . . . based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." Rutan v. Republican Party of Ill., 497 U.S. 62, 74-75 (1990). Defendants fail to show that any of the promotional opportunity positions at issue here are anything other than lower-level public employment positions for which the Elrod-Branti political patronage analysis is inapposite.

If Elrod-Branti does not apply, then Pickering

does. Here, May's political opposition to Hand is a matter of public concern. See Thomas v. Carpenter, 881 F.2d 828, 830 (9th Cir. 1989) (statements made in context of sheriff election were addressed to matter of public concern). Defendants fail to show that May's placement in one of these positions would impair discipline or co-worker harmony, disrupt the workplace, or "have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary[.]" Wheaton v. Webb-Petett, 931 F.2d 613, 618 (9th Cir. 1991). Thus, as to the First Amendment component of these claims, the only issue remaining is whether May was denied the positions because of this political opposition to Hand.

The positions at issue are several temporary corrections sergeant positions, two patrol deputy positions, an assignment for disaster relief in North Dakota, and a patrol deputy position assigned to the Grand Ronde Tribe. May presents no evidence supporting an age discrimination claim for any of these positions. As to the First Amendment claim, however, May states that on the day Hand told him that his captain position was to be eliminated, Hand also told him he was filing an elections complaint against him. May also states that County Commissioner Tom Bunn told him that the elimination of the captain positions was not about money as Hand had asserted and that Hand did not want May and Hailey in the sheriff's organization.

With the exception of the temporary corrections sergeant positions requiring one year of corrections experience and the patrol deputy position for which plaintiff did not score in the top ten of the applicant

test, May's evidence is sufficient to create a jury issue as to whether defendants' failure to place him in any of the other positions was in retaliation for May's political opposition to Hand. Defendants argue that because several months passed between the November 1996 election and May's failure to obtain any of these positions, the evidence is insufficient to show retaliation. I disagree. While the lapse of time may go to the weight of the evidence, it does not disprove a retaliatory motive. I grant summary judgment to defendants on the age discrimination components of these claims and on the First Amendment components of the patrol deputy position in which plaintiff did not make the top ten and the temporary corrections sergeant positions requiring one year of corrections experience. I deny the motion as to the other claims.

CONCLUSION

Defendants' motion in the Hailey case, No. CV-97-1712-PA, (#17) is granted. Defendants' motion in the May case, No. CV-97-1177-PA (#34) is granted in part and denied in part as follows: the motion is granted in all respects except for the following promotional opportunities: the May 1997 temporary corrections sergeant positions (First Amendment basis only); temporary patrol deputy position filled by reserve deputy (First Amendment basis only); disaster relief project in North Dakota (First Amendment basis only); and patrol deputy position for Grand Ronde

Tribe (First Amendment basis only).

DATED this 12th day of May, 1998.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LARRY HAILEY,	)	
	)	
Plaintiff,	)	CV 97-1712-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL COUNTY, an Oregon Municipal entity,	)	ORDER
	)	Filed May 12, 1998
Defendants.	)	

Defendants' motion for summary judgment (#17) is granted.

DATED this 12th day of May, 1998.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LARRY HAILEY,	)	
	)	
Plaintiff,	)	CV 97-1712-PA
	)	
v.	)	
	)	
NORM HAND and YAMHILL COUNTY, an Oregon Municipal entity,	)	**JUDGMENT OF DISMISSAL**
	)	
	)	Filed May 12, 1998
Defendants.	)	

Based upon the record, this action is dismissed.

DATED this 12th day of May, 1998.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE